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No. 262.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

LOUIS J. BECKER, Collector of Internal Revenue,

Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, a Corporation, and WILLIAM EDWIN GUY, Executors of the Estate of William Evans Guy, deceased,

Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

RHODES E. CAVE,
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St. Louis, Missouri,
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THE COURT PRESS, N. Y. C.

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Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

Summary of Argument.

I.

There was no evidence to support the Trial Court's finding that the trusts were created in contemplation of death.

II.

The thing taxed is the transmission of property from the dead to the living. If no substantial rights of control or enjoyment are retained by the decedent, the nature of the title, if any, retained is controlling.

III.

The instruments created fees, not life estates, and nothing of substance was retained. The distinction

between a vested interest and an expectancy is one of substance.

IV.

The right to the return of the property which remained in the decedent was not capable of valuation. The valuation made by the Commissioner, if sustained, would render the statute of doubtful constitutionality.

V.

The argument that *McCormick* v. *Burnet* was decided without due consideration of the question here involved and without reference to *Klein* v. *United States* is refuted by an examination of the record in the *McCormick* case.

Argument.

Trusts Not Created in Contemplation of Death.

The Trial Court found, as a fact, that one of the decedent's motives in creating the trusts was "to make provision for the distribution of the property to his children at decedent's death (R. 16)". The finding, being no broader than the evidence which supports it, amounts to no more than a finding of the unquestioned fact that each trust contains a provision for distribution upon decedent's death. As pointed out in our brief in chief, such a provision affords no evidence that the trusts were testamentary in character or were made in contemplation of death. Neither does the presence of such provision have the slightest tendency to indicate that the thought of death in the sense of a specific concern with the ap-

proach of a future event with a view to which action was taken possessed the mind of the decedent. It does show that the decedent, in common with all intelligent men, was not unmindful of the fact that he would have to die some time. Each trust also provides for the termination of the trust upon the death of the beneficiary prior to decedent's death. It could be argued with equal force that the trusts were created in contemplation of the death of the beneficiary.

The purposes which the evidence showed the decedent wished to accomplish by these trusts could not have been effected without the transfer of the principal. The gift of the income without any transfer of the source of the income would have been ineffective. The gift of the income is inseparable from the transfer of the corpus.

The record shows that the Commissioner never determined that the transfers were made in contemplation of death (R. 6, 10, 11, 37). "The original assessment rested upon a finding presumptively correct, but the presumption of its correctness does not extend to other findings which the Commissioner has never made". *Taylor* v. *Commissioner*, 70 Fed. (2d) 619, C. C. A. 2; *First National Bank of Boston* v. *Commissioner*, 63 Fed. (2d) 685, C. C. A. 1.

Even if any presumption existed, it was rebuttable and vanished upon introduction of affirmative testimony to the contrary. *Willcutts* v. *Stultz*, 72 Fed. (2d) 868, 872; *Flannery* v. *Willcutts*, 25 Fed. (2d) 951; *Brown* v. *Commissioner*, 74 Fed. (2d) 281; *Lippincott* v. *Commissioner*, 72 Fed. (2d) 798.

TRUSTS NOT INTENDED TO TAKE EFFECT AT DEATH.

As used in the Act, "possession and enjoyment" refer to the *right* to possession and enjoyment, rather than actual possession and enjoyment. If the right to receive the trust property either in fee or in remainder is, by the instrument, fixed in a person other than the grantor, the death of the grantor may be the event upon which actual enjoyment vests without incurring tax, *Reinecke* v. *Northern Trust Company*, 278 U. S. 339; *Coolidge* v. *Long*, 282 U. S. 582; *Burnet* v. *Northern Trust Company*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *May* v. *Heiner*, 281 U. S. 238. Conversely, where the right to take the property upon the termination of a particular estate remains in the grantor until his death, no transfer takes place until that time even though actual possession and enjoyment have been given to another. *Klein* v. *U. S.*, 283 U. S. 231.

The petitioner's theory ignores the fundamental character of the tax. "The thing taxed is the transmission of property from the dead to the living" (*Heiner* v. *Donnan*, 285 U. S. 312, 322). This Court has never held a trust taxable as a transfer intended to take effect at or after death except where the grantor retained an interest in the property which passed to the living upon his death. An interest sufficient for taxability may be one of control, possession, beneficial enjoyment or title. If a power of recall or of control is reserved, it is immaterial that technically title may be lodged elsewhere. *Reinecke* v. *Northern Trust Company*, *supra* l. c. 345; *Coolidge* v. *Long*, *supra*, l. c. 629. Where, as here, no substantial rights of control or enjoyment are reserved, nothing remains but title to which the tax can attach. In

such a case, the nature of the title retained becomes controlling.

The Government contends that only life estates were created. If further authority that defeasible fees were created, be needed, we submit the following: *Duval* v. *Duval,* 316 Mo. 626, 291 S. W. 488. A will devised land "to my son John C. Duval and my daughter, Molly R. Ewing" and provided "these lands are given under these express conditions: that neither of these devisees having any children and if either die leaving no living child, the other shall inherit the entire lands, and if both should die leaving no child or children living, then said lands *shall revert to my estate* and be divided amongst my other living children, or, if dead, their children, if any living. Said lands cannot be sold by said devisees except for life of either or the survivor, but if they or either of them shall have any living children, then said lands shall be an absolute gift and shall be treated so in all respects". (Italics ours.)

Held, a defeasible fee and not an estate for life or lives was created, and, after the birth of a child to Molly the deed of John and Molly conveyed the entire estate.

Sullivan v. *Garesche,* 229 Mo. 496, 129 S. W. 949.

A residuary clause in a will provided as follows:

> "All the rest and residue * * * I give and bequeath to my daughters Kate and Julia in equal parts between them, *to have and to hold same as hereinafter stated.* In case of the marriage or the death of either of my said

daughters Kate and Julia, the share of the one so marrying or dying shall go to the other." (Italics ours).

"In the event of the marriage or death of my said daughters Kate and Julia, said property shall be divided equally among all of my children."

"In the event of the death of both of my said daughters, Kate and Julia before marriage, said property shall be divided equally among my surviving children."

Held l. c. 507:

"The will of Maria Taylor does not in terms give to the two daughters named a life estate; it gives them the property in fee subject to being cut down to a life estate in the event of their death without ever having married. The language of the will is: 'All the rest and residue of my property of which I may be possessed at the time of my death, I give and bequeath to my daughters Kate and Julia in equal parts between them. To have and to hold the same, as hereinafter stated'. That is to say, it is an absolute estate except as it might be cut down as thereinafter specified. Under the express term of our statute, Section 4646, Revised Statutes, 1899, words of inheritance are not necessary in a will to create an estate in fee; when an estate is granted it is limited or qualified only by words in the will limiting or qualifying it. The only words in this will limiting or qualifying the estate granted are: 'In the event of the death of both of my said daughters Kate and Julia before marriage the said property shall be divided equally among my surviving children'. Therefore if they or either of them should marry the event

> on which their estate might be cut down can never occur and their estate will remain absolute."

Also l. c. 507:

> "But if the particular estate is not a mere life estate, if it is a determinable fee, liable to be cut down on the happening of the event on which the future estate depends and that event does not occur, then the fee is not cut down and there is no reversion."

Also l. c. 509:

> "After a particular estate, something remains. After a fee, nothing."

The decedent here had what was left of the fee after a determinable fee has been granted. This was not a present interest in the property. *Sullivan* v. *Garesche, supra.* He had the same interest which C would have on a grant from A to B in fee; if B dies before C, then to C, but if C dies before B, then to remain B's absolutely—a mere expectancy, not even a contingent remainder. In the *Klein* case and in *Commissioner* v. *Schwartz,* 74 Fed. (2d) 712, the grantors had what was left after a life estate—a vested right to the property immediately upon the determination of the life estate. The courts have consistently maintained this distinction. *Klein* v. *Commissioner,* 42 Fed. (2d) 596. Where there is a defeasance clause the transfer is complete and vested when made; the possibility of reverter to the grantor may take effect, but, if so, it takes effect by way of a condition subsequent and "at or after" the death of someone else, not the grantor; his death transmits nothing, on it his expectancy simply lapses. Where there is a retained reversion or remainder the transfer is incom-

plete when made, something is left in the grantor; it goes from him, if at all, only on his death, which thereby is made a condition precedent; it therefore takes effect at his death, is transmitted by his death. See, also, IV Kent. Com. (6th ed.) star paging pp. 9-10 and notes 124-33, 202-06, 353-6; Challis on Real Property, 2nd Ed., pp. 73-5; 1 Tiffany on Real Estate (1920 Ed.), Sec. 93; *Robeson* v. *Duncan*, 74 N. J. Eq. at p. 570; *Finlay* v. *King*, 3 Pet. 346, 374-5; *Croxall* v. *Sherrerd*, 5 Wall. 268, 287-8; *Doe* v. *Considine*, 6 Wall. 458; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Shukert* v. *Allen*, 273 U. S. 545; *Coolidge* v. *Long*, *supra*; *Freeholders of the County of Cumberland* v. *Buck*, 79 N. J. Eq. 472, 475; *Dusenberry* v. *Johnson*, 59 N. J. Eq. 336; *First Universalist Society* v. *Boland*, 155 Mass. 171, 174-5; *Nicoll* v. *N. Y. & E. R. R. Co.*, 12 N. Y. 121, 130-1, 132, 134; *Upington* v. *Corrigan*, 151 N. Y. 143, 150-3; *Calvary Presbyterian Church* v. *Putnam*, 249 N. Y. 111, 115-6; *Curley* v. *Tait*, 276 Fed. 840, 842; *Burnet* v. *Pacific etc. Bank* (C. C. A. 9), 45 F. (2nd) 773, 777, certiorari denied, 283 U. S. 825; *Nichols* v. *Bradley* (C. C. A. 1), 27 F. (2d) 47, 48.

In *Matter of Barstow*, 230 N. Y. App. Div. 371, 372-3, affirmed 256 N. Y. 647, the same ruling was made as to a defeasance clause under the New York inheritance tax law. The Court said:

> "* * * Mrs. Barstow could do nothing to change the effect of the deed. The corpus was beyond her control, except for the happening of the contingency that she might survive the two life tenants, and then she would have been revested with the corpus. *The rights of the beneficiaries did not depend upon the death of the donor. The term of the trust was not mea-*

sured by the life of the donor, but by the lives of her two daughters. * * * There was the contingency that she might survive her daughters, and that did not depend upon affirmative or volitional act of the donor. As stated by Judge Cardozo in the *Schmidlapp* Case (236 N. Y. 278): 'In *Matter of Craig* (97 App. Div. 289, aff'd 181 N. Y. 551) the remainder was contingent, *but the contingency was not dependent on the will of the donor and the right as against him was already perfect and complete'.* And so, in the present case, the right independent of anything Mrs. Barstow could do, was already complete." (Italics ours.)

Furthermore, the expectancy or possibility which the decedent had was not capable of valuation. The Commissioner has not attempted to evaluate it. An unrealized expectancy constitutes neither an asset of an estate (*Pringle* v. *Commissioner* (C. C. A. 9), 64 Fed. (2d) 862; *Commissioner* v. *Rosser* (C. C. A. 3), 64 Fed. (2d) 631) nor a deduction from an estate when in favor of a charity (*Humes* v. *United States*, 276 U. S. 487).

Patently, the value of the expectancy was not equal to the value of the fee simple estate in the property, nor even to a small percentage thereof. Yet, the Commissioner has assessed a tax upon the same basis. A tax which bears no reasonable relation to the privilege taxed is arbitrary and void. *Nichols* v. *Coolidge*, 274 U. S. 531. A construction should be avoided which would render the statute as applied of doubtful constitutionality. *Reinecke* v. *Northern Trust Company, supra.* We are not prepared to say that Congress has no power to levy a tax upon the con-

version of a beneficiary's interest from a defeasible to an indefeasible one upon the death of a grantor or another. (*Cf. Tyler* v. *United States,* 281 U. S. 497; *Chase National Bank* v. *United States,* 278 U. S. 327. We do say that Congress has not undertaken to tax such a conversion as a transfer intended to take effect at death.

An examination of the record in the *McCormick* case refutes utterly the argument that this Court did not intend that case to be a decision upon the question involved in the instant case. The record reveals that the *McCormick* case was advanced on the docket to be argued together with the *Klein* case because, as stated by the Government in its motion, they involved a related question—the same question here involved; that the major portions of the briefs of both parties were addressed to this question; and that the Court considered the cases together and, after due consideration, distinguished them upon the ground that the *McCormick* case involved a conveyance in fee with a mere possibility of reverter, whereas, the *Klein* case involved a present conveyance only of a life estate with the reversion expressly reserved.

Respectfully submitted,

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